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No. 88-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL NO. 391,
Petitioner,

v.

THOMAS C. TERRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is there a right to a jury trial of employees' claims against their union alleging that the union breached its duty of fair representation—a duty which has been implied from § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a)—whenever the employees seek monetary compensation in any form (e.g., backpay) as a part of their request for relief?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 863 F.2d 334 (1988), and is reprinted at pp. 30-52 of the Appendix to the Petition for *Certiorari* ("Pet. App."). The Memorandum Opinion of the United States District Court for the Middle District of North Carolina denying petitioner's motion to strike the respondents' jury trial demand is reported at 676 F.Supp. 659 (1987) and is reprinted at Pet. App. 1-30. The decision of the Court of Appeals granting the petition of Chauffeurs, Teamsters and Helpers, Local No. 391 ("Local 391" or "Petitioner") for an interlocutory appeal on the jury trial issue is reprinted at Pet. App. 30.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1988. On March 10, 1989, Local 391 applied for an extension of time to file a petition for a writ of *certiorari*. That application was granted on March 14, 1989 by order of the Chief Justice, extending the time for filing a petition to and including April 19, 1989. The petition was filed on April 18, 1989 and granted on June 19, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

A claim against a union for breach of its duty of fair representation ("DFR") is implied from § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) ("NLRA"), which provides:

> (a) Representatives designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

1. On July 25, 1983 the respondents commenced this action in the District Court against their union (Local 391), their employer (McLean Trucking Company (hereinafter "McLean")), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "International").[1] The facts, as alleged in the amended complaint and as recounted in the opinions of the Court of Appeals and District Court, are as follows.

McLean and Local 391 were parties to a collective bargaining agreement. Each of the respondents was employed as a truck driver in the bargaining unit covered by that agreement. Prior to July, 1982, each lived in a location other than Winston-Salem, North Carolina. In July, 1982, McLean revamped its operations and in so doing closed the terminals near respondents' homes. Pursuant to the collective bargaining agreement's "change of operations" provisions, each of the respondents then bid for, and was transferred to, McLean's Winston-Salem terminal. After being transferred to the Winston-Salem terminal, respondents were laid off and recalled on several occasions.

In their amended complaint respondents contended that McLean had breached the agreement by manipulating re-

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[1] Although the amended complaint named McLean as a defendant, McLean thereafter filed a petition in bankruptcy and the action against McLean was stayed. Pet. App. 32, n.1; 863 F.2d at 235 n.1. On July 6, 1988, respondents eventually filed a voluntary dismissal as to McLean. And, although the amended complaint also named the Teamsters International as a defendant, the District Court granted the International's motion for summary judgment. Pet. App. at 32, n.1; 863 F.2d at 335 n.1.

call procedures so as to give other drivers preference over them. Pet. App. 33-34; 863 F.2d at 335. Respondents also contended that Local 391 failed to fairly represent them in the resulting grievances. *Id.*

The first set of grievances filed by respondents were pursued by Local 391 to an arbitration panel established under the collective bargaining agreement. As a result, McLean was ordered to adjust its layoff policy to comply with previous agreements between McLean and Local 391. Pet. App. 34; 863 F.2d at 335.

In a second set of grievances, respondents contended that McLean had engaged in a pattern of layoff and recall activity in order to circumvent the prior arbitration award. *Id.* Local 391 pursued respondents' second set of grievances to another arbitration panel established under the collective bargaining agreement. The grievances were denied. Pet. App. 34; 863 F.2d at 336.

Local 391 declined to take a third set of grievances filed by respondents to arbitration on the ground that all of the issues had been decided in the first and second arbitration awards.

As explained by the Court of Appeals, respondents contend that Local 391 "conspired with McLean and acquiesced in its violation of [their] rights and in other ways breached its duty of fair representation in the[se] grievance proceedings." Pet. App. 34-35; 863 F.2d at 336.

2. In their amended complaint, respondents contended, too, that because of the asserted breach of the duty of fair representation, the arbitration awards should not be final and binding but should be set aside. In addition, respondents "request[ed] reinstatement and other injunctive relief . . . punitive damages and other monetary relief for lost wages and health benefits and for mental and

emotional distress." Pet. App. 10; 676 F.Supp. at 661. By order dated January 9, 1989, the District Court struck the respondents' claim for punitive damages and for mental and emotional distress.[2]

On January 6, 1986, Local 391 filed its Motion to Strike Plaintiffs' Jury Trial Demand, contending that no right of jury trial existed in a duty of fair representation suit. In an order dated November 10, 1987, the District Court denied that Motion (Pet. App. 1; 676 F. Supp. 659), but certified the jury trial issue for interlocutory appeal pursuant to 29 U.S.C. § 1291(b). Joint Appendix ("J.A.") p. 78. On November 19, 1987, Local 391 petitioned the Court of Appeals for permission to appeal pursuant to 28 U.S.C. § 1291(b), and that petition was granted by order of the Fourth Circuit, dated December 20, 1988. Pet. App. 30. The Fourth Circuit, after briefing and argument, then affirmed the District Court's order, holding that the Seventh Amendment does grant a right to a jury trial of DFR claims for monetary relief such as backpay. Pet. App. 31; 863 F.2d 336.

In holding that there is a jury trial right in such cases, however, the Fourth Circuit recognized that the District of Columbia Circuit and the Eleventh Circuit had previously come to contrary conclusions on this issue. Pet. App. 45; 863 F.2d at 338. In *Leach v. Pan American World Airways*, 842 F.2d 285 (11th Cir. 1988), the Eleventh Circuit had held that parties in DFR suits have no right to jury trials, and in *Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984), the D.C. Circuit had held that parties in DFR suits are entitled to a jury trial if the plaintiff is seeking backpay.[3]

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[2] Because McLean has ceased operation and is no longer in this case, *see* note 1, *supra*, "injunctive relief in the form of reinstatement" is also no longer at isesue. Pet. App. 10; 676 F.Supp. at 661.

[3] Although the *Leach* decision involved an action for breach of the duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ("RLA"), rather than the NLRA, the Court

On June 19, 1989, this Court granted review on this issue.

SUMMARY OF ARGUMENT

A right to a jury trial can stem either from statute or from the Seventh Amendment itself. In a suit by an employee against the employee's union for breach of the union's duty of fair representation, neither source provides for a trial by jury.

1. The cause of action for breach of the duty of fair representation has been "judicially 'implied from the [NLRA and Railway Labor Act] and the policy [of exclusive representation] which [those acts] adopted.'" *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979) (quoting *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 204 (1944)). Since these Acts do not so much as mention a duty of fair representation, and do not explicitly provide for such cause of action, the statutes do not, in terms, create a jury trial right for fair representation claims. *See* pages 10-11, *infra*.

In enacting the NLRA, however, Congress did consider whether to authorize jury trials as the method of adjudicating the unfair labor practice actions created by the Act, and specifically *declined* to do so. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). Given the similarity between unfair labor practices claims and breach of duty of fair representation claims, *DelCostello v. Teamsters*, 462 U.S. 151, 170 (1983), the fair inference is that Congress would not have intended juries to try the latter claims. *See* page 11, *infra*.

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of Appeals in that case correctly noted that the same rules would apply to actions under the NLRA. 842 F.2d at 287 n.2 (for purposes of fair representation suits courts have refused to distinguish the two acts) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)). Accordingly, in this brief, we will generally discuss the duty of fair representation under the NLRA and will not distinguish between the two acts unless the distinction is relevant.

2. This case thus turns on whether the Seventh Amendment itself requires a jury trial right in fair representation cases. The Court has recently stated the test for resolving this issue as follows:

> "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera v. Nordberg*, —— U.S. ——, 57 U.S.L.W. 4898, 4900 (June 23, 1989) (quoting *Tull v. United States*, 481 U.S. 412, 417-518 (1987).]

a. Of course, no such concept as a union's duty of fair representation existed in the 18th-century. But, after Congress established a national labor policy based on collective bargaining, this Court has been able to draw on traditional legal concepts in elaborating Congress' plan and has done so in implying the duty of fair representation. The duty of fair representation has its origins in the distinctive concepts of Equity's law of trusts, under which a trustee, vested with a grant of discretionary powers to act on behalf of third parties—and not subject to the plenary control of those parties—is nonetheless required to exercise that discretion in good faith, and only in those parties interests. Of course, the law of trusts—and the rights and duties the Chancellors created—was the exclusive province of Equity. *See* pages 12-16, *infra*.

b. The similarities between duty of fair representation claims of a union-represented employee and traditional equitable claims of trust beneficiaries can be clearly seen in the context of hybrid duty of fair representation suits. The structure of such suits, in which both union and employer are joined as defendants in one action brought by a plaintiff complaining of both breach of the duty of fair representation and breach of the collective bargaining agreement, is largely modeled on trust law. *See* pages 16-20, *infra*.

c. In addition to these two links to trust law, there is an additional compelling link to historic equity suits.

A hybrid duty of fair representation suit seeks "to set aside a final and binding determination of a grievance, arrived at through the collectively bargained method of resolving the grievances. It is, therefore *a direct challenge to the private settlement of disputes* under the collective-bargaining agreement," *United Parcel Services, Inc. v. Mitchell*, 451 U.S. 56, 66 (1981) (Stewart, J., concurring) (internal quotation marks and brackets deleted; emphasis added). *Accord DelCostello v. Teamsters, supra*, 462 U.S. at 165. That being so, a hybrid suit is analogous to a traditional bill in Equity seeking to vacate an arbitrator's award for unfairness in the proceedings. And in the 18th-century, such a suit could *only* be entertained in the court of Equity. *See* pages 20-21, *infra*.

3. Examination of remedies in a case such as this provide no basis for concluding this action is "legal" rather than "equitable."

a. Although respondents seek backpay as a form of monetary "make-whole" relief, this is precisely the form of relief awarded in Equity for breach of duty by a trustee. *See* pages 23-24, *infra*.

b. Not surprisingly, then, this Court has previously characterized backpay remedies as equitable in a variety of contexts. Most important is the example of backpay claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* For the scheme of relief under Title VII, like the scheme here, is based on the relevant provisions and policies of the NLRA. *See* pages 24-26, *infra*.

c. A critical difference between "law" and "equitable" remedies is the difference between the defined remedies awarded as of right in law, and the remedial discretion of Equity. The remedial decisions in a hybrid duty of fair representation action involve highly discretionary judgments. *See* pages 26-27, *infra*. The ultimate remedial standard is that a successful DFR plaintiff should be placed in the position in which he would have been after a fair arbitration decision. Thus, a DFR remedy must account for the nature of labor arbitration. And this

Court has repeatedly recognized the broad range of discretion accorded a labor arbitrator in the interest of achieving the objective of national labor policy. At no point in the arbitral process is an informed and flexible discretion more important than at the remedial stage. Thus, of necessity, providing make-whole relief in a hybrid case calls for equitable discretion and not for the traditional law's remedies. *See* pages 27-32, *infra*.

ARGUMENT

I. THERE IS NO EXPRESS OR IMPLIED STATUTORY BASIS FOR A JURY TRIAL RIGHT IN DUTY OF FAIR REPRESENTATION CASES.

In a federal statutory case, there are two potential bases for a jury trial demand: a right created in the federal statute or the right stated in the Seventh Amendment itself. Thus, the threshold question whenever a jury trial is sought in such a case is whether Congress has created such a right. *Tull v. United States, supra*, 481 U.S. at 417, n.3 (1987).

The private sector labor relations statutes—the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, and the Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.*—do not so much as mention a cause of action against a union for breach of its duty of fair representation, nor, indeed, the duty itself. Rather, the duty has been "judicially 'implied from the [NLRA and RLA] and the policy [of exclusive representation] which [those statutes] adopted.'" *Electrical Workers v. Foust, supra*, 442 U.S. at 47 (1979) (quoting *Steele v. Louisville & Nashville R. Co., supra*, 323 U.S. at 204). Indeed, the DFR action "had not yet [been] divined" when Congress passed the NLRA in 1395, *United States Postal Service v. Mitchell, supra*, 451 U.S. at 76, and was not judicially established until nine years after the NLRA's passage, *see Steele v. Louisville & Nashville R. Co., supra*.

In enacting the NLRA, however, Congress did consider whether to authorize jury trials as the method of adjudicating the unfair labor practice actions created by that Act. And Congress specifically *declined* to provide for such jury trials. *NLRB v. Jones & Laughlin*, *supra*, 301 U.S. at 48-49; *see also* 2 NLRB Legislative History of the NLRA of 1935 (1949), at 1630, 2168, 2189, 2233-2234 (unsuccessful criticisms of bills for not providing for jury trials). This Court has noted that "[c]ommunity hostility toward unions, management, or minority views can . . . find expression" in jury awards. *Electrical Workers v. Foust*, *supra*, 442 U.S. at 51 n.14; *see also Automobile Workers v. Russell*, 356 U.S. 634, 651 (1958) (Warren, C.J. dissenting). Congress, recognizing as much, preferred to establish an expert administrative agency that would be less likely to proceed on emotion and more likely to make the factual judgments relevant to the application of national labor policy in a neutral and objective manner.

There is, of course, a "substantial overlap" and a "family resemblance [that] is undeniable" between fair representation claims and unfair labor practice claims. *DelCostello v. Teamsters*, *supra*, 462 U.S. at 17. Given this, it is highly doubtful that Congress would have intended that some of these similar (and often identical) disputes—and not others, depending on the claimant's choice—be tried to a jury. Thus, the fair inference to be drawn from the decision the 1935 Congress reached is this: it follows from Congress' determination not to authorize jury trials in NLRA proceedings that Congress would *not* have intended juries to try the closely analogous DFR actions derived by implication from the NLRA. A contrary conclusion would in many instances bring about the result Congress rejected and would in that way trump a judgment Congress made in shaping the national labor policy.

II. THE SEVENTH AMENDMENT DOES NOT REQUIRE A JURY TRIAL RIGHT IN DUTY OF FAIR REPRESENTATION CASES.

This case thus turns on whether, in the absence of any Congressional intent to provide such a right, the Seventh Amendment itself provides for a jury trial in fair representation cases.

The Seventh Amendment states in pertinent part that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." "Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791," its application is not limited to traditional "common-law forms of action recognized at that time." *Curtis v. Loether*, 415 U.S. 189, 193 (1974). Rather, the Amendment draws a more general distinction between "suits in which *legal* rights [are] to be ascertained and determined" (and which would have been tried to juries in the 18th-century law courts) and those in which "equitable rights alone [are] recognized, and equitable remedies . . . administered" (and which would have been tried to the 18th-century equity courts with no jury). *Id.* (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-447 (1830) (Story, J.)) (emphasis in original).

The Court has recently stated that the inquiry, in the context of evaluating modern statutory causes of action, is "whether [the] action is more similar to cases that were tried in courts of law [or] to suits tried in courts of equity or admiralty." *Tull v. United States*, *supra*, 481 U.S. at 417. *See also Granfinanciera v. Nordberg*, supra, —— U.S. at ——, 57 U.S.L.W. at 4900 (quoting and following *Tull*). And a two-pronged examination is called for in making this comparison:

First, the Court will "compare the statutory action [in question] to the 18th-century actions brought in courts of England prior to the merger of the courts of law and equity." *Tull*, *supra*, 481 U.S. at 417.

Second, the Court will "examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 417-418.[4]

Following this analysis, we now show that there is *no* Seventh Amendment right to a jury trial for claims that a union violated its duty of fair representation.

A. The Nature of the DFR Action In Relation To Traditional Actions.

A comparison of an action for breach of the duty of fair representation to "18th-century actions brought in the courts of England," 481 U.S. at 417, reveals, of course, that no such action was known at that time.

The DFR is a "creature of 'labor law'." *United Parcel Service v. Mitchell*, *supra*, 451 U.S. at 63. And the 18th century legal scheme—under which unions and collective bargaining were unlawful—had neither room nor need for such a body of law. *See, e.g., Nelles, The First American Labor Case*, 41 Yale L.J. 165, 195-199 (1931) (describing 18th-century English holdings that unions were unlawful conspiracies to raise wages). But, after Congress had established a national labor policy in which collective bargaining was central, this Court was able to draw on certain basic and traditional equitable concepts in elaborating Congress' plan.

As we will show, an examination of this Court's jurisprudence makes it plain that the fair representation duty has its origins in the traditions of Equity's law of trusts. That duty rests on the distinctive model of trust law—which alone recognized the concept of equitable interests—

[4] If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, the Court has looked to a third factor, "whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as a fact finder." *Granfinanciera*, *supra*, 57 U.S.L.W. at 4900. "This quite distinct inquiry," *id.* at n.4, is only tangentially implicated in this case. *See* page 10, *supra*.

and which created and enforced obligations for regulating the discretion of a "trustee," who has been granted certain discretionary powers by a "settlor" to be exercised for the benefit of third parties, and who is not subject to those parties' plenary control. *See generally* 1 A. Scott, The Law of Trusts, §§ 1, 2 & 8 (4th ed. 1987). The traditional common law recognized no such relationship and, hence, created no such body of law.

1. The starting point in the formulation of the duty of fair representation is that, under national labor policy, a union, once selected by a majority of an appropriate employee bargaining unit, is vested by law with the status of "exclusive representative[] of all the employees in such unit for . . . purposes of collective bargaining," 29 U.S.C. § 159(a).

Although this system is correctly premised on the legislative judgment that entrusting the employees' chosen representative with the exclusive right to deal with the employer immeasurably enhances the bargaining position of the employees as a group, exclusive representation also necessarily alters the legal situation of each individual in the group. As Justice Jackson explained, exclusive representation, regardless of any individual employee's preferences, "not only precludes the individual from being represented by others but also prevents him from bargaining for himself." *Trailmobile v. Whirls*, 331 U.S. 40, 68 (1947) (Jackson, J., dissenting) (citing *J.I. Case v. NLRB*, 321 U.S. 332 (1944)).

There is no doubt that Congress envisoned that a union, when acting as the exclusive representative of the employee group, would enjoy a substantial measure of autonomy and would exercise a substantial measure of discretion and judgment. That is a necessary postulate of the collective bargaining system, since differing employee interests will often exist within a bargaining unit. *See*

Ford Motor Co. v. Huffman, 345 U.S. 330, 337-340 (1953).

But the Court has concluded that an exclusive representative has not been granted *unbounded* autonomy and discretion. In the Court's view, the traditional duty of a trustee to exercise all his granted discretion in good faith and in the interest of the trust beneficiaries is an integral part of the grant of exclusive representative status. The seminal duty of fair representation decision —*Steele v. Louisville & N.R. Co., supra*—identifies the duty as an instance of the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." 323 U.S. at 202.

The union—like the traditional trustee—has been granted discretionary powers for the benefit of a group of employees.[5] And the union—like the traditional trustee—is not subject to each beneficiary's direction and control. Rather, each employee in the represented group—like the traditional trust beneficiary—must rely on the union's best judgment as to the group's interests and as to how those interests are to be furthered. Moreover, after *Steele*, each employee in the represented group—like each traditional trust beneficiary—is recognized as having an enforceable right of redress if the union fails to comply with its duty to act in good faith in pursuit of the employee's interests.

A DFR claim is thus, in its essence, a claim by an employee that his union has exercised its statutory discretion contrary to the obligations that govern—and limit—that discretion and in so doing has violated his rights as

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[5] In traditional trust law, of course, the initial grant of authority comes about through the action of a private settlor, while here the initial grant is contained in a statute and is conditioned on an affirmative majority decision of the relevant employee group.

a beneficiary of the grant of discretionary authority to the union. *See, e.g.*, Cox, *Rights Under A Labor Agreement*, 69 Harv.L.Rev. 601, 619-620, 645-646, 652 (1956) (the "fairest and most practical approach" to understanding the relationship of union, employees and employer is by analogy to "the traditional trust" in which "the trustee can enter into binding settlements . . . and the beneficiary's remedy is to show a breach of fiduciary duty"); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich.L.Rev. 1, 21 (1958) (the union's duty is modeled on that of a trustee charged with acting "for the benefit of a large and ever changing group of beneficiaries who may have divergent interests"); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal.L.Rev. 663, 819 (1973) (comparing duty of fair representation litigation to traditional trust litigation); Jones, *The Origins of the Concept of the Duty of Fair Representation*, in The Duty of Fair Representation (J. McKelvey, ed. 1977), at 27-28, 42 (duty of fair representation is rooted in "law of trusts and fiduciary obligations").

The law of trusts, of course, was developed *solely* in the courts of Equity and has continuously remained within the province of Equity. *See* G. Bogert & G. Bogert, Law of Trusts and Trustees, § 870 (rev. 2d ed. 1982) ("The court of equity first recognized the trust as a legal institution and has fostered and developed it, . . . beneficiary's remedies are equitable in origin and depend upon the application of equitable principles"); 3 A. Scott, Law of Trusts, § 797 (4th ed. 1987) (trust relationships "are, and have been since they were first enforced, within the peculiar province of courts of equity"); Restatement (Second) of Trusts, § 197 (with narrow exceptions "the remedies of the beneficiary against the trustees are exclusively equitable").

Thus, since claims relating to a trustee's abuse of his discretion were equitable, such claims have not been, and

are not now, tried to a jury. G. Bogert & G. Bogert, The Law of Trusts and Trustees, *supra*, § 870, at 97; 3 A. Scott, Law of Trusts, *supra*, § 197.2 at 193.

2. The similarities between duty of fair representation claims and traditional trustee breach of fiduciary duty claims can be seen even more clearly by examining the nature of "hybrid" duty of fair representation suits, such as the hybrid action initially filed in this case.

In a series of cases, this Court has endorsed the joinder into one action of a duty of fair representation claim against a union and a claim against an employer under § 301 of the LMRA, 29 U.S.C. § 185, for a breach of the collective bargaining agreement. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Bowen v. Postal Service*, 459 U.S. 212 (1982); *DelCostello v. Teamsters*, *supra*. As we will show, the basic structure of this hybrid claim has, in large part, been "borrowed" from trust law.[6]

We begin with a brief review of the normal factual context that gives rise to a "hybrid DFR/§ 301 action". Hybrid actions involve an employee working under a collective bargaining agreement between the union and the employer that provides for a private grievance settlement mechanism. In such a grievance mechanism, the union, as exclusive representative of the employees, will normally retain some degree of discretion to pursue or settle grievances, and the agreement usually provides that the outcome of the grievance mechanism will be final and binding.

[6] Although respondents' original suit had joined the employer, McLean, as a co-defendant, McLean's case is no longer part of this litigation. *See* n.1, p. 3, *supra*. Any Seventh Amendment rights must thus rest on the nature and remedies of the DFR claim itself.

Nevertheless, given that this Court has recognized that the two halves of a "hybrid" action are "inextricably interdependent", and require the same elements of proof, *DelCostello*, *supra*, 462 U.S. at 164-165, an examination of the nature of the "hybrid" case as a whole is instructive as to how properly to characterize the duty of fair representation claim for Seventh Amendment purposes.

The legal context of hybrid litigation is that an agreement between an employer and union providing for such a "grievance machinery . . . is at the very heart of the system of industrial self-government" envisioned by national labor policy. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). *See also* LMRA § 203 (d), 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon between the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement".) Thus, employees are *not* normally permitted to sue the employer for breach of the collective bargaining agreement, but must instead pursue relief through the collectively-bargained grievance procedure. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). And, "[s]ubject to very limited judicial review, [employees] will be bound by the [grievance procedure's] result." *DelCostello*, *supra*, 462 U.S. at 164 (citing *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960.))

In a hybrid action, an employee asserts that a court should intervene to overturn the grievance machinery's results despite the national labor policy in favor of private dispute settlements between unions and employers. To accomplish this, an employee must prove *both* that the employer breached the agreement *and* that the union breached its duty of fair representation in performing its role as representative in the grievance machinery. Thus, as this Court has explained, both parts of the hybrid action are "inextricably interdependent . . . amounting to 'a direct challenge to the private settlement of disputes under the collective bargaining agreement.'" *DelCostello*, *supra*, 462 U.S. at 164-165 (quoting *United States Parcel Service v. Mitchell*, *supra*, 451 U.S. at 66 (Stewart, J.,

concurring)). And, accordingly, the Court has made clear that to prove his case the employee must prove both breaches:

> "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." . . . The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. [*DelCostello*, *supra*, 462 U.S. at 165 (quoting *United Parcel Service v. Mitchell*, *supra*, 451 U.S. at 66-67 (Stewart, J., concurring)).]

The hybrid action, like the duty of fair representation action in general, thus rests on the fact that a union has been entrusted with discretion on behalf of the employee group as a whole. The hybrid action is, in essence, the vehicle for examining the union's exercise of that discretion in negotiating agreements with the employer and in enforcing employee claims under those agreements. Thus, not surprisingly, just as the DFR concept is rooted in trust, the structure of a hybrid DFR/§ 301 action is quite similar to a traditional trust action in which an individual beneficiary complains that a trustee has improperly failed to pursue claims against a third party on the beneficiary's behalf.

In trust law, as a general matter, trust beneficiaries may *not* independently pursue beneficial claims against third parties, but must rely instead on the discretion of the trustee regarding pursuit of such claims. In this regard, the trustee, in essence, exercises a right of exclusive representation. *See* 4 A. Scott, *supra*, § 282 at 27 ("[I]t is for the trustee and not for the beneficiaries to sue. . . . As between the beneficiaries and the outside world, it is the trustee who represents the estate and the beneficiaries of the trust.") This is so, even where the trustee fails to pursue claims, as long as the trustee has made a proper determination that it is prudent to refrain

from doing so. Restatement (Second) of Trusts, § 282(2) (comment e) at 46; 4 A. Scott, *supra*, § 282.1 at 32-33.

But, as in labor law, trust law recognizes that beneficiaries are entitled to have the trustee exercise this discretion properly. The beneficiary is thus no longer bound by the trustee's actions if the claims have not been pursued due to a trustee breach of duty. In such instances, the beneficiary may join the trustee and the third party in one action and assert in his own name *both* the claim of breach of fiduciary duty and the claim of the individual on the underlying obligation. *See* 4 A. Scott, *supra*, § 282.1; Restatement (Second) of Trusts, *supra*, § 282 (2). And, under trust law, both of these claims are treated as equitable because both claims are, in substance, assertions of *beneficial* rights generated by the trust relationship. Assertions of such equitable rights were not recognized at the traditional common law. 4 A. Scott, *supra*, § 281 at 21.

As four members of this Court have noted, the similarity between this sort of trust action and the hybrid DFR/§ 301 action is striking:

> Just as an individual employee may bring a suit for breach of contract against his employer if, but only if, the union has breached its duty of fair representation in determining not to pursue the grievance on the employee's behalf, a trust beneficiary may sue to enforce a contract entered into on his behalf by the trustee if, but only if, the trustee "improperly refuses or neglects to bring an action against the third person". [*Bowen v. Postal Service*, *supra*, 459 U.S. 212 at 243 (White, J., with whom Marshall, Blackmun, and Rehnquist, JJ., join, concurring in part and dissenting in part) (quoting Restatement (Second) of Trusts, § 282(2) (1959)).] [7]

[7] While Justice White's explication of the analogy between trust law and the duty of fair representation is stated in a partial dissent, the majority opinion contains nothing to the contrary. To the extent that the majority resolved the issue in that case—apportion-

And this similarity between the hybrid action and a traditional trust action has been widely noted in the relevant literature.[8]

3. In addition to the two links to trust law just discussed, there is an additional compelling link to historic equity suits. As already noted, a hybrid DFR/§ 301 suit seeks "to set aside a final and binding determination of a grievance, arrived at through the collectively bargained method of resolving the grievance. It is, therefore, *a direct challenge to the private settlement of disputes* under the collective-bargaining agreement." *United Parcel Service, Inc. v. Mitchell, supra,* 451 U.S. at 66 (Stewart, J., concurring) (internal quotation marks and brackets deleted; emphasis added). *Accord DelCostello, supra,* 462 U.S. at 165.

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ment of liability between union and employer—differently from traditional trust rules, the majority did so for reasons of federal labor policy that in its view were not sufficiently taken into account by analogies drawn from *any* other field of law, and not out of any belief that *some* field of law other than trusts offered a closer analogy. *See* 459 U.S. at 224-228. Indeed, one of the authorities cited by the majority for support on its view of apportionment had also noted the close relationship between the hybrid DFR/§ 301 action and the traditional trust suit. *See,* Feller, *A General Theory of the Collective Bargaining Agreement, supra,* 61 Calif.L.Rev. at 805, 819 (cited at 459 U..S at 224 n.8).

[8] *See, e.g.,* Cox, *Rights Under A Labor Agreement,* 69 Harv. L.Rev. 601, 619-620, 645-646, 652 (1956); Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 Mich.L.Rev. 1, 21 (1958); *Jenkins v. Wm. Schluderberg-T.J. Kurdle Co.,* 217 Md. 556, 559-560, 144 A.2d 88, 90 (1958); *Falsetti v. Local 2026, United Mine Workers,* 400 Pa. 145, 161 A.2d 882, 895-896 (1960).

While Professor Cox's 1956 article and the *Jenkins* case were cited approvingly by the Court in *Vaca v. Sipes, supra,* 386 U.S. at 186 n.11, 191, the discussions therein of the trust law analogy were not explicitly noted. *But see* Feller, *A General Theory of Collective Bargaining Agreements, supra,* 61 Calif.L.Rev. at 805 ("*Vaca* essentially adopted the position urged by Archibald Cox in 1956 . . . [that] employees' rights under agreements containing a grievance procedure are entrusted to the union as a fiduciary.")

That being so, a hybrid suit is analogous to a traditional bill in equity seeking to vacate an arbitrator's award for unfairness in the proceedings. *Cf. United Parcel Service v. Mitchell, supra* (barring employee action against employer under § 301 on basis of state statute of limitations for actions to vacate arbitration awards). And in the 18th-century, *only an equity court* could set aside an arbitration award on the basis of circumstances extrinsic to the award itself. *See Wills v. Maccarmick,* 95 Eng. Rep. 736 (2 Wils. K.B. 148) (1763) ("[A] jury . . . cannot find any matter or fact dehors the award: by parity of reason, nothing dehors the award (as partiality is) can be given to them in evidence. . . . In a trial at law . . . there is no precedent at law of any writ to set aside an award.") *Accord Braddick v. Thompson,* 103 Eng. Rep. 374 (8 East, 344) (1807).

As Justice Story stated, "at the common law . . ., no extrinsic circumstances, or matter of fact, *dehors* the [arbitration] award, can be pleaded or given in evidence to defeat it. Thus, for example, fraud, partiality, misconduct, or mistake of the arbitrators, is not admissible to defeat it. But courts of equity will, in all such cases, grant relief, and upon due proofs, will set aside the award." 2 J. Story, Commentaries on Equity Jurisprudence, § 1452 at 704-705 (12th ed. 1877). *Accord,* 4 W.H. Page, The Law of Contracts, § 2551 at 4479 (2d ed. 1920); 2 W. Story, A Treatise on the Law of Contracts, § 1375 at 558 (5th ed. 1874). *See also Burchell v. Marsh,* 58 U.S. (17 How.) 344 (1854) (reviewing bill in equity to vacate arbitration award).

4. We hasten to add that the foregoing is not intended as an argument that the law governing the duty of fair representation should as a general matter be developed simply by following rules in the law of trusts in particular or the law of the equity courts generally. The duty is, we recognize, a creature of federal labor policy, and —while examples from other fields may be instructive—

it is to be developed principally out of the needs and dictates of labor policy. *See* note 7, *supra*.

Our point for present purposes is that the duty of fair representation *was* derived from well-established equitable principles, most especially the principles developed in the law of trusts. And, *for Seventh Amendment purposes*, this is *the decisive* point. Because the rights asserted by an employee in a duty of fair representation suit—or in a hybrid DFR/§ 301 suit—are *beneficial rights* derived from a trust-like fiduciary relationship between the exclusive bargaining representative and the represented employees, such rights are, by their nature, *equitable rights*. In addition, because a hybrid action is an effort to overturn the results of the grievance machinery analogous to a suit in equity seeking to vacate a facially valid arbitration award, it is, again, *equitable* in nature.

Accordingly, no jury trial right is required by the Seventh Amendment's mandate that "[i]n [s]uits at common law . . . the right of trial by jury shall be preserved." These kinds of suits were never entertained "in suits at common law."

B. The Nature of the Remedies Sought.

The Court of Appeals based its decision below principally on the fact that respondents here seek lost wages and lost employee benefits as relief for the alleged union breach of duty. Characterizing it as a close question, that court determined that this claim for "backpay, as a form of money damages, may appropriately be considered legal in nature." Pet. App. 50; 863 F.2d at 339. The District Court rested on similar grounds. Pet. App. 18; 676 F. Supp. at 662-663.[9]

[9] Although the District Court also noted that respondents requested damages for emotional distress, *see* Pet. App. 18; 676 F.Supp. 663, this element of requested relief is no longer relevant to this case. By order dated January 9, 1989, respondents' request for emotional distress damages (along with respondents' request for punitive damages) was dismissed from the amended complaint. The Court of Appeals, which was informed of the pending motion to dismiss these relief claims, did not consider these claims in its decision.

In determining that respondents' claims for lost wages and benefits caused by the alleged DFR breach somehow rendered this action legal rather than equitable, the courts below erred.

1. The plainest evidence that there is nothing inherently "legal" about respondents' claim to be compensated for the monetary losses (e.g., lost wages and benefits) that were allegedly caused by a union breach of duty is that this is precisely the form of *equitable relief* that trust law recognized, and recognizes, as appropriate in cases of a trustee's breach of duty.

The rule of traditional trust law is dispositive of the issue: "It is elementary that a trustee who commits a breach of trust can be required to pay from his own pocket the damages caused to the trust beneficiaries. . . . The measure of liability is usually not a question of great difficulty. The beneficiaries . . . may demand that they be placed in the same financial situation as if the wrong had not been perpetrated." G. Bogert & G. Bogert, Handbook of the Law of Trusts, § 157 at 562, 564 (5th ed. 1973). *Accord* G. Bogert & G. Bogert, The Law of Trusts and Trustees, *supra*, § 862 at 27-32; 3 A. Scott, *supra*, § 2-5 at 237-240; Restatement (Second) of Trusts, § 205.

Thus, while the courts below considered monetary make-whole relief inherently "legal", such relief has in fact been long regarded by trust law as a wholly appropriate—and *wholly equitable*—form of relief to be granted in cases where a trustee's breach of duty causes monetary loss to a beneficiary. *See, e.g., Caffrey v. Darby*, 31 Eng.Rep. 1159 (6 Ves. Jun. 489) (1801) (ordering trustee to make a beneficiary financially whole for losses resulting from trustee's failure to make timely

claims against third party); *Norton v. Steinkopf*, 69 Eng.Rep. 20 (23 L.J. Ch. 35) (1853) (same). *See generally Waterman v. Alden*, 144 Ill. 90, 32 N.E. 972, 975 (1893) ("That courts of chancery have jurisdiction generally, on the application of beneficiaries of a trust fund, to charge trustees with losses occurring through their [breach], is too clear to call for the citation of authorities.").

Since redress for a trustee's breach of duty was exclusively within the province of equity, and since equity provided beneficiaries with make-whole monetary relief in cases of breach, the backpay relief sought here certainly cannot be deemed inherently "legal".

2. Even apart from trust law, the federal courts—including this Court—have repeatedly characterized awards of backpay to an improperly terminated employee as a form of *equitable* relief.

Thus, in *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960) this Court inferred a backpay remedy for retaliatory discharges in violation of the Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3). Although the statute contained no explicit provision for backpay, the Court held that it could be inferred from the traditional powers of an "equity court". *Id.* at 291. *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-417 (1975) (describing *DeMario* as resting on " 'the historic power of equity' to award lost wages to workmen unlawfully discriminated against").

Most important is the example of backpay claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, since the scheme of relief under Title VII, like the scheme here, is based on the relevant provisions and policies of the NLRA. *Albemarle, supra*, 422 U.S. at 419 (Title VII's "backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act"). In *Albemarle*, the Court, after extensive

discussion, accepted Congress' characterization of Title VII backpay awards as equitable. *Id.* at 418. And, the Court has subsequently expressly stated that "there is no right to trial by jury in cases arising under Title VII." *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981). *See also Great American Fed. Sav. & Loan Ass'n. v. Novotny*, 442 U.S. 366, 373-374 (1979) (noting that every court of appeals that has confronted the question has concluded that, because of their equitable character, backpay claims under Title VII do not call for a jury trial);[10] *Albemarle, supra*, 422 U.S. at 441-447 (Rehnquist, J., concurring).

Of course, the remedial policies behind the instant duty of fair representation claim are modeled on the NLRA every bit as much as the remedial policies of Title VII, albeit by implication rather than by explicit provision. This could not be clearer. In *Electrical Workers v. Foust, supra*, a case involving a DFR action brought under the Railway Labor Act, this Court explained that in formulating DFR remedial policies, a court's "function . . . is to implement a remedial scheme that will best effectuate the purposes of" the labor statute upon which the DFR action is based, "recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace." 442 U.S. at 47; *see also id.* at 52 (deciding *not* to permit punitive damages in DFR suits after looking to NLRA and "general labor policy" for guidance and citing *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940) (no punitive relief under NLRA) and *Carpenters v. NLRB*, 365 U.S. 651, 655 (1961) (same)).

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[10] This has always been the uniform view of the courts of appeals. *See e.g., Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983); *Grayson v. Wickes Corp.*, 607 F.2d 1194 (7th Cir. 1979); *EEOC v. Detroit Edison*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975); *Cox v. Babcock & Wilcox*, 471 F.2d 13 (4th Cir. 1972); *Robinson v. Lorilard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969).

Given that a Title VII backpay claim and a DFR backpay claim are thus both based on the policies and provisions of the NLRA, it would simply defy logic to characterize backpay under Title VII as equitable in nature, and to deny that characterization to the DFR backpay claim in the instant case.

Put simply, DFR backpay, just like Title VII backpay —and NLRA backpay (on which both are based)—is equitable in nature.

3. The considerations that support characterizing backpay as equitable in a hybrid DFR/§ 301 action are, indeed, far stronger than the considerations that have led to that characterization of backpay in Title VII or NLRA actions.

In determining whether a particular form of monetary relief is legal or equitable in nature, a prominent consideration is whether the successful plaintiff is entitled to such relief *as a matter of right*, as was the case in the common-law courts, or whether the relief is subject to the sound discretion of the court, as was the case in Equity. *See Curtis v. Loether*, *supra*, 415 U.S. at 196-197. As this Court has explained, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). *Compare* 1 C. Pomeroy & J. Pomeroy, A Treatise on Equity Jurisprudence, § 109 at 140 (2d ed. 1892) ("The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaption to circumstances, and the technical rules which govern their use.")

While both Title VII and the NLRA allow for a narrow area of discretion regarding the award of backpay, that level of discretion is sufficient to classify backpay as equitable under those statutes. *Albemarle*, *supra*, 422 U.S. at 417, 421, 424-425; *see also id.* at 441-447 (Rehnquist, J.

concurring). And there is certainly no reason to believe that relief in duty of fair representation litigation should be subject to *less* discretion. *See Vaca v. Sipes*, *supra*, 386 U.S. at 195 ("The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach.").

Indeed, as we now show, the remedial decisions that must be made in hybrid DFR/§ 301 litigation entail far more complex discretionary judgments than Title VII. This highly discretionary remedial scheme renders such litigation wholly alien to traidtional common law practice.

a. In *Electrical Workers v. Foust*, *supra*, this Court articulated two essential principles regarding the proper approach to DFR remedies. First, the controlling measure of monetary relief in DFR litigation is "the compensation principle", such that a successful plaintiff should generally be placed in as good a position as he would have been in the absence of a union breach, but not better. 442 U.S. at 49 ("compensation principle [must be used] not only to gauge the sufficiency of relief but also to limit union liability"). Second, DFR remedies must be designed to "best effectuate the purposes of [federal labor policy], recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace." *Id.* at 47.

Given these principles, the benchmark for evaluating monetary relief in a DFR case like this one is that a successful plaintiff is to be placed in the same position as he would have enjoyed after obtaining an arbitration award in a fairly conducted proceeding under the collective bargaining agreement's grievance machinery. Accordingly, a proper remedy determination must take into account, as best as can be done, the likely remedial approach of a labor arbitrator under the collective bargaining agreement in question.[11]

b. To understand the extent of the discretion exercised by labor arbitrators—and demanded by the parties to a collective bargaining agreement—it is crucial, first, to recognize the important differences between collective bargaining agreements and conventional contracts. As this Court has said:

> The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It calls into being a new common law—the common law of a particular industry or of a particular plant. . . . "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." [*Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 578-579 (1960) (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-1499 (1959)).]

In the context of such agreements, the informed discretion and judgment of arbitrators becomes crucial to the success of the collective relationship, and the parties fully understand—and require—that their agreements

[11] For a court to ignore the likely approach of a labor arbitrator would, of course, violate *both* of the principles articulated in *Foust*. First, arbitration would have been the method for resolving the grievance had there been no union breach of duty. Any effort to place the plaintiff in the position he would have been in had no breach occurred obviously has to account for arbitration. Second, judicial recognition and respect for arbitration is, of course, a central part of the national labor policy, reflecting its central role in facilitating the collective bargaining process. *See, e.g., Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 581; *Paperworkers v. Misco*, —— U.S. ——, 56 U.S.L.W. 4011 (Dec. 1, 1987); *see also* 29 U.S.C. § 173(d).

will be given meaning through the arbitrator's exercise of discretion:

> Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.
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> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished. [*Warrior & Gulf*, *supra*, 363 U.S. at 581-582.]

Under such an arrangement, all parties intend that equitable discretion be exercised in achieving a proper resolution of grievances. As this Court has noted, DFR litigation may involve "interpretation of critical terms in the collective agreement affecting the entire relationship between company and union." *DelCostello*, *supra*, 462 U.S. at 169 (internal citations omitted). But, the range of remedial discretion involved in even a relatively routine discharge case is extensive.

How arbitrators adjudicate discharge and other discipline cases is examined in detail in Professor Feller's article:

> Both the standards applied to determine the propriety of a discharge and the remedies available if the discharge is found improper are quite different [in labor arbitration than they are under the common law]. . . . In a discharge dispute there may, of course, be a question whether the employee has violated a rule embodied in the agreement or which the agreement authorizes. But under a collective agreement it is understood that this is only the first question and, in most cases, the least important one. The next, and most frequently disputed, issue is whether that violation is of such character as to justify the quantum of punishment imposed. Discharge, which is frequently referred to as "industrial capital punishment," is only one of the possible forms of discipline. [Feller, *A General Theory of the Collective Bargaining Agreement*, *supra*, 61 Calif. L. Rev. at 780.]

As Professor Feller then makes clear, in assessing whether the discipline imposed was merited under the agreement, myraid factors apeparing nowhere in the agreement are considered, and even where discipline of some kind is deemed justified, the arbitrator often exercises purely remedial discretion:

> Taken into consideration in determining whether [the punishment imposed] or some lesser punishment is appropriate are such factors as the seriousness of the offense, the degree of culpability, the amount of damage to the employer, the employee's length of service, his prior disciplinary record. and the likelihood that the offense will be repeated. The predominant philosophy is that "capital punishment" should not be levied until it has been established that the employee will not respond to lesser penalties, and there are obvious analogies to—as well as differences from—the punishment system of the criminal law. Under most agreements, if the employer determines that discharge is the appropriate penalty, an arbitrator to whom the discharge is appealed has authority to modify the penalty and substitute one of the lesser forms of discipline, or to order reinstatement without packpay. [For example, where] an employee . . . refuses to obey a contractually improper order—discipline of some sort is almost always sustained, but discharges almost never. [*Id.* at 780-781.]

Other leading authorities fully agree with this discription of an arbitrator's range of remedial discretion. *See, e.g.*, F. Elkouri & E. Elkhouri, *How Arbitration Works*, 650-690 (describing aribtral approaches to discharge and discipline cases.).

c. The point of this excursion into the theory of labor agreements and labor arbitration is this: the common law's system of "legal" remedies was a system in which defined remedies followed automatically from proof of a defined wrong. In contrast the system for defining and vindicating an individual employee's rights under a collective bargaining agreement is, and has always been, one in which the decisionmaker calibrates the remedy to the precise situation before him (and, indeed, defines the governing "rights and wrongs" through a process of litigating elucidation based on the agreement's words and "the realities of industrial life," *Humphrey v. Moore*, 375 U.S. 335, 358 (1964) (Goldberg, J., concurring in the result)). In this context, the granting of defined remedies as of right, in response to proof of defined wrongs, has no basis in the "make-whole" concept that animates the labor arbitration—and hence the DFR—remedial scheme.[12]

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[12] A number of courts of appeals have, in a variety of circumstances, approved of district court's discretion to issue arbitration orders in the midst of a duty of fair representation case and then to stay further proceedings until an arbitrator's award is issued. *See, e.g., Ames v. Westinghouse Electric Corp.*, 864 F.2d 289 (3d Cir. 1988); *Niro v. Fearn Intern. Inc.*, 827 F.2d 173 (7th Cir. 1987); *Stanton v. Delta Air Lines*, 669 F.2d 833 (1st Cir. 1982); *Ruzicka v. General Motors*, 523 F.2d 306 (6th Cir. 1975). *Compare, Vaca v. Sipes*, *supra*, 386 U.S. at 196 ("an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved").

These decisions have their base in the centrality of the arbitration process to the proper resolution of the issues in, and the proper

Rather, the universal understanding of parties to collective bargaining agreements has been to rely on equitable judgments which "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles, supra*, 321 U.S. at 329. In this context, the concept of "make-whole" relief calls for processes of evaluation and judgment that have never been the functions of common law courts, and certainly never of juries.

CONCLUSION

For the above stated reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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determination of a remedy in, a hybrid DFR/§ 301 case. The possibility—and often the desirability—of resolving issues in these cases through arbitration orders, of course, illustrates further the need for the extensive flexibility and discretion in adjudicating claims that was an attribute of Equity, and distances these cases even further from the common law model of litigation and relief.